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TAN JYE YEE & ANOR v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
ROHANA YUSUF JCA
TENGKU MAIMUN JCA
B [CRIMINAL APPEAL NO: W-09-327-12-2013]
6 AUGUST 2014

CONSTITUTIONAL LAW: *Interpretation – Pith and substance test – Section 298A of Penal Code – Whether a subject matter of religion or public order – Majority*
C *in Supreme Court case of Mamat Daud & Ors v. The Government of Malaysia that s. 298A a law on religion – Whether created binding precedent*

CIVIL PROCEDURE: *Judicial precedent – Stare decisis – Supreme Court decision in Mamat Daud & Ors v. The Government of Malaysia – Whether majority*
D *judgment created binding precedent – Whether dissenting judgment could be accepted as correct state of law over majority judgment*

The appellants were charged for the offences, *inter alia*: (i) under s. 4(1)(c) of the Sedition Act 1948 in relation to the appellants' posting of a Hari Raya Greeting on their Facebook; (ii) under s. 298A(1)(a) of the Penal Code
E ('s. 298A') for the same posting; and (iii) under s. 5(1) of the Film Censorship Act 2002 for certain obscene publication on their Tumblr website. The appellants pleaded not guilty and claimed trial to all the three charges. The appellants also sought to strike out the charge under s. 298A seeking declarations (i) that s. 298A is unconstitutional as it contravened the
F appellants' right to freedom of expression under art. 10(1)(a) of the Federal Constitution ('Constitution'); and /or (ii) that s. 298A is a legislation made by Parliament under art. 11(4) of the Constitution and para 4(k) (Federal List), Ninth Schedule of the Constitution relating to the religion of Islam for the Federal Territory and is therefore not applicable to the appellants who are non-Muslims. The application was premised on the fact that the Supreme
G Court had already decided on the legality of s. 298A in the cases of *PP v. Mohamed Nor & Ors* ('*Mohamed Nor*') and *Mamat Daud & Ors v. The Government of Malaysia* ('*Mamat Daud*'). The High Court dismissed the appellants' application relying on *Mohamed Nor* and the minority judgment in *Mamat Daud*. The issue for the court's determination in the appeal by the appellants
H was whether s. 298A is in pith and substance a legislation on the religion of Islam or whether it is a legislation concerning public order. The appellants submitted that the trial judge was bound by the majority decision in *Mamat Daud*. The Deputy Public Prosecutor ('DPP'), on the other hand, submitted that the doctrine of *stare decisis* should not be followed blindly and that the
I decision in *Mamat Daud* should not be given a blanket application. The DPP further submitted that the *ratio decidendi* of the Supreme Court decisions in *Mamat Daud* and *Mohamed Nor* were in conflict.

Held (allowing appeal)
Per Tengku Maimun JCA delivering the judgment of the court:

(1) The decision of *Mamat Daud* was on the principle of law. In considering the issue whether Parliament or the State Legislative Assemblies should legislate the impugned section, the Supreme Court had, by majority, ruled that s. 298A is, in pith and substance, a law on religion while the dissenting judgment ruled that it is on public order and criminal law. It was the majority judgment of the Supreme Court that created the binding precedent. The dissenting judgment could not be accepted as the correct state of law over the majority judgment. (para 24)

(2) In light of the Supreme Court decision in *Mamat Daud*, it was not open for the court to investigate the true character or substance of s. 298A. Hence, there was no necessity to consider whether the pith and substance of s. 298A was a subject matter of religion or public order. Instead, what the court had to consider was the application of the doctrine of *stare decisis*. (paras 19 & 20)

(3) In *Mohamed Nor*, there was no challenge on s. 298A and the only issue before the Supreme Court was whether the sentence passed by the High Court was appropriate. Since the issue was purely on the adequacy of sentence, there was no proposition by the Supreme Court in *Mohamed Nor* on the true character and substance of s. 298A. In the circumstances, it could not be said that the *ratio decidendi* of the two decisions of the Supreme Court was in conflict with one another. The trial judge had therefore erred in refusing to follow the majority decision of the Supreme Court on the true character and substance of s. 298A. (paras 27, 29 & 30)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu dipertuduh dengan kesalahan-kesalahan, antara lain: (i) di bawah s. 4(1)(c) Akta Hasutan 1948 berkaitan dengan paparan Ucapan Hari Raya di Facebook mereka; (ii) di bawah s. 298A(1)(a) Kanun Keseksaan ('s. 298A') bagi paparan yang sama; dan (iii) di bawah s. 5(1) Akta Penapisan Filem 2002 bagi penerbitan lucah tertentu dalam laman sesawang Tumblr mereka. Perayu-perayu merayu tidak bersalah dan memohon dibicarakan bagi ketiga-tiga pertuduhan tersebut. Perayu-perayu juga memohon untuk membatalkan pertuduhan di bawah s. 298A dengan memohon deklarasi-deklarasi (i) bahawa s. 298A adalah tidak berperlembagaan kerana ia bercanggah dengan hak kebebasan bersuara perayu-perayu di bawah per. 10(1)(a) Perlembagaan Persekutuan ('Perlembagaan'); dan/atau (ii) bahawa s. 298A adalah perundangan yang dibuat oleh Parlimen di bawah per. 11(4) Perlembagaan dan perenggan 4(k) (Senarai Persekutuan), Jadual Kesembilan Perlembagaan berkaitan dengan agama Islam bagi Wilayah Persekutuan dan oleh itu tidak terpakai kepada perayu-perayu yang bukan

A beragama Islam. Permohonan tersebut adalah berdasarkan fakta bahawa Mahkamah Agung telah pun memutuskan kesahan s. 298A dalam kes *PP v. Mohamed Nor & Ors* ('*Mohamed Nor*') dan *Mamat Daud & Ors v. The Government of Malaysia* ('*Mamat Daud*'). Mahkamah Tinggi menolak permohonan perayu-perayu dengan menyandar atas kes *Mohamad Nor* dan penghakiman minoriti
B dalam *Mamat Daud*. Isu bagi pertimbangan mahkamah dalam rayuan oleh perayu-perayu adalah sama ada s. 298A adalah pada asasnya suatu perundangan berkaitan agama Islam atau sama ada ia adalah perundangan berkaitan dengan ketenteraman awam. Perayu-perayu menghujahkan bahawa hakim bicara terikat dengan keputusan majoriti dalam *Mamat Daud*.
C Sebaliknya, Timbalan Pendakwaraya ('TP') menghujahkan bahawa doktrin *stare decisis* tidak boleh diikuti dengan membuta tuli dan bahawa keputusan dalam *Mamat Daud* tidak boleh dipakai secara menyeluruh. TP selanjutnya menghujahkan bahawa *ratio decidendi* keputusan-keputusan Mahkamah Agung dalam *Mamat Daud* dan *Mohamed Nor* adalah bercanggah.

D **Diputuskan (membenarkan rayuan)**
Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Keputusan *Mamat Daud* adalah atas prinsip undang-undang. Dalam mempertimbangkan isu sama ada Parliman atau Majlis Perundangan Negeri yang wajar menggubal seksyen yang dipersoalkan, Mahkamah
E Agung telah, dalam penghakiman majoriti, memutuskan bahawa s. 298A adalah, pada asasnya, undang-undang berkaitan agama sementara penghakiman menentang memutuskan bahawa ia adalah berkaitan ketenteraman awam dan undang-undang jenayah. Hanya keputusan majoriti Mahkamah Agung membentuk duluan mengikat. Penghakiman
F menentang tidak boleh diterima sebagai kedudukan undang-undang yang benar mengatasi penghakiman majoriti.

(2) Berdasarkan keputusan Mahkamah Agung dalam *Mamat Daud*, tidak terbuka untuk mahkamah menyiasat gambaran sebenar atau asas kepada s. 298A. Oleh itu, tidak ada keperluan untuk mempertimbangkan sama
G ada pada asasnya s. 298A adalah perkara berkaitan agama atau ketenteraman awam. Sebaliknya, apa yang mahkamah perlu pertimbangkan adalah pemakaian doktrin *stare decisis*.

(3) Dalam kes *Mohamed Nor*, s. 298A tidak dicabar dan satu-satunya isu di Mahkamah Agung adalah sama ada hukuman yang diluluskan oleh
H Mahkamah Tinggi adalah wajar. Oleh sebab isu tersebut adalah semata-mata mengenai kecukupan hukuman, tidak ada saranan oleh Mahkamah Agung dalam kes *Mohamed Nor* tentang gambaran sebenar dan asas bagi s. 298A. Dalam keadaan sedemikian, tidak boleh dikatakan bahawa *ratio decidendi* kedua-dua keputusan Mahkamah Agung bercanggah antara satu
I sama lain. Oleh itu, hakim bicara telah terkhilaf apabila enggan mengikuti keputusan majoriti Mahkamah Agung bagi gambaran sebenar dan asas bagi s. 298A.

Case(s) referred to:

Barat Estates Sdn Bhd v. Parawakan Subramanian & Ors [2000] 3 CLJ 625 CA ***(refd)***
Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***
Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal [2006] 1 CLJ 996 CA ***(refd)***
Mamat Daud & Ors v. The Government of Malaysia [1988] 1 CLJ 11 SC ***(foll)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 25 SC ***(dist)***

Legislation referred to:

Criminal Procedure Code, s. 294
Federal Constitution, arts. 4, 10(1)(a), 11(4)
Film Censorship Act 2002, s. 5(1)
Penal Code, s. 298A(1)(a)
Sedition Act 1948, s. 4(1)(c)

For the appellants - Chong Joo Tian (Wong Kee Them & Nur Adilah Kamarzaman with him); M/s JT Chong Assocs
For the prosecution - Wan Shaharuddin Wan Ladin (Haffiza Jemali with him); DPPs

[Editor's note: For the High Court judgment, please see Tan Jye Yee & Satu Lagi lwn. PP [2013] 1 LNS 1244.]

Reported by S Barathi

JUDGMENT

Tengku Maimun JCA:

[1] The appellants had posted on their Facebook a Hari Raya Greetings, the contents among which are the photographs of the appellants enjoying Bak Kut Teh with the "Halal" logo and the following comments:

> Selamat Berbuka Puasa (dengan Bak Kut Teh ... wangi, enak menyelerakan!!! ... Izinkan kami memperkenalkan cara kami memupuk semangat 1 Malaysia dengan bertukar-tukar makanan antara kaum-kaum Malaysia pada musim perayaan yang mulia ini. Hak untuk menikmati juadah enak tempatan seharusnya merentasi batasan bangsa dan juga agama. Kepada saudara-saudari yang beragama Islam, selamat berbuka puasa dan Salam Aidilfitri.

[2] The appellants were charged in the Sessions Court Kuala Lumpur for the following offences:

(i) under s. 4(1)(c) of the Sedition Act 1948 in relation to the appellants' posting of a Hari Raya Greeting on their Facebook intituled "Selamat Berbuka Puasa (dengan Bak Kut Teh ... wangi, enak, menyelerakan");

(ii) under s. 298A(1)(a) of the Penal Code for the same posting; and

(iii) under s. 5(1) of the Film Censorship Act 2002 for certain obscene publication in their Tumblr website.

[3] The appellants pleaded not guilty and claimed trial to all the three charges.

[4] The appellants then sought to strike out the charge under s. 298A of the Penal Code for creating enmity between persons of different religions as a result of the said posting. They filed an application in the High Court seeking *inter alia*, the following declaration:

(i) that s. 298A is unconstitutional as it contravenes the appellants' right to freedom of expression under art. 10(1)(a) of the Federal Constitution; and/or

(ii) that s. 298A is a legislation made by Parliament under art. 11(4) of the Federal Constitution and para. 4(k) (Federal List) of the Ninth Schedule, Federal Constitution relating to the religion of Islam for the Federal Territory and is therefore not applicable to the appellants who are non-Muslims.

[5] Essentially, the application was premised on the fact that the Supreme Court had already decided on the legality of s. 298A of the Penal Code.

[6] For convenience, s. 298A is reproduced below:

> (1) Whoever by words, either spoken or written, or by signs, or by visible representations, or by any act, activity or conduct, or by organizing, promoting or arranging, or assisting in organizing, promoting or arranging, any activity, or otherwise in any other manner:
>
> (a) causes, or attempts to cause, or is likely to cause disharmony, disunity, or feelings of enmity, hatred or ill will; or
>
> (b) ...
>
> on grounds of religion, between persons or group of persons professing the same or different religions, shall be punished with imprisonment for a term of not less two years and not more than five years.
>
> (2) Sections 173A and 294 of the Criminal Procedure Code shall not apply in respect of an offence under subsection (1).
>
> (3) Where any person alleges or imputes in any manner specified in subsection (1):
>
> (a) that any person, or any class, group or description of persons, professing any particular religion:
>
> (i) had ceased to profess that religion;
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> (ii) should not be accepted, or cannot be accepted, as professing that religion; or
>
> (iii) does not believe, follow, profess, or belong to, that religion; or
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> (b) that anything lawfully done by any religious official appointed, or by any religious authority established, constituted or appointed, by or under any written law, in the exercise of any

power, or in the discharge of any duty, or in the performance of any function, of a religious character, by virtue of being so appointed, established or constituted, is not acceptable to such person, or should not be accepted by any other person or persons, or does not accord him or fulfil the requirements of that religion, or is otherwise wrong or improper;

he shall be presumed to have contravened the provisions of subsection (1) by having acted in a manner likely to cause the disharmony, disunity or feelings of enmity, hatred or ill will, or likely to prejudice the maintenance of harmony or unity, between persons or groups of persons professing the religion referred to in the allegation or imputation.

(4)(a) Where, on the ground of a religious character, any person professing any particular religion uses for burial or cremation of any human corpse a place other than one which is lawfully used for such purpose by persons professing that religion, he shall be presumed to have contravened the provisions of subsection (1) by having acted in a manner likely to cause disharmony, disunity or feelings of enmity, hatred or ill will, or likely to prejudice the maintenance of harmony or unity, between persons or groups of persons professing that religion.

(b) Where any person, on any ground of a religious character, counsels, advises, instigates, urges, pleads with or appeals or propagates to, or in any manner or by any means calls upon, whether directly or indirectly, any other person or persons professing any particular religion:

(i) to use for burial or cremation of any human corpse a place other than one which is lawfully used for such purpose by persons professing that religion;

(ii) not to use for burial or cremation of any human corpse any place which is lawfully used for such purpose by persons professing that religion; or

(iii) not to use for worship any place which is lawfully used for such purpose by persons professing that religion, he shall be presumed to have contravened the provisions of subsection (1) by having acted in a manner likely to cause disharmony, disunity or feelings of enmity, hatred or ill will, or likely to prejudice the maintenance of harmony or unity, between persons or groups of persons professing that religion or different religions.

(5) Where any person who is not a religious official appointed, or a religious authority established, constituted or appointed, by or under any written law purports to exercise any power, or to discharge any duty, or to perform any function, of a religious character, being a power, duty or function which can be lawfully exercised, discharged or performed only by a religious official appointed, or a religious authority established, constituted or

A appointed, by or under any written law, he shall be presumed to have contravened the provisions of subsection (1) by having acted in a manner prejudicial the maintenance of harmony or unity, between persons or groups of persons professing the same or different religions.

B (6) The foregoing provisions of this section shall not apply to:

(a) anything done by any religious authority established, constituted or appointed by or under any written law and conferred by written law with power to give or issue any ruling or decision in any manner pertaining to the religion in respect of which the authority is established, constituted or appointed; or

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(b) anything done by any person which is in pursuance of, or which accords with, any ruling or decision given or issued by such religious authority, whether or not such ruling or decision is in writing, and if in writing, whether or not it is published in the Gazette.

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(7) It shall not be a defence to any charge under this section to assert that what the offender is charged with doing was done in an honest belief in, or in any honest interpretation of, any precept, tenet or teaching of any religion.

E (8) If in any proceedings under this section any question arises with regard to the interpretation of any aspect of, or any matter in relation to any religion, the Court shall accept the interpretation given by any religious authority referred to in subsection (6), being a religious authority in respect of that religion.

F **Proceedings In The High Court**

[7] Central to the arguments of learned counsel for the appellants and the learned Deputy Public Prosecutor was the two decisions of the Supreme Court in the case of *PP v. Mohamed Nor & Ors* [1985] 1 LNS 25; [1985] 2 MLJ 200 and *Mamat Daud & Ors v. The Government of Malaysia* [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197.

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[8] Relying on *Mohamed Nor*, *supra*, and the minority judgment in *Mamat Daud*, *supra*, the High Court dismissed the application.

[9] Aggrieved by the said decision, the appellants appealed to the Court H of Appeal. We had unanimously allowed the appeal and we now give our reasons.

The Appeal

[10] As in the High Court, the crux of the submissions before us was on I the issue whether s. 298A is in pith and substance a legislation on the religion of Islam or whether it is a legislation concerning public order. Reliance was again placed by the respective parties on the Supreme Court decisions in the abovementioned cases.

[11] Given the reliance on the two decisions, we think it is appropriate to state the gist of those cases. A

[12] In *PP v. Mohamed Nor*, the first and the fourth respondents were charged for acting in a manner likely to prejudice the maintenance of unity on grounds of religion between persons professing the religion of Islam by acting as Bilal during the performance of Friday prayers, an offence under s. 298A of the Penal Code. The second respondent was charged under the same section but as Imam and the third respondent, as Khatib. The learned trial judge bound them over a period of three years to keep the peace and be of good behaviour under s. 294 of the Criminal Procedure Code. The Public Prosecutor appealed on the ground that the learned judge had failed to impose a deterrent sentence. The appeal was dismissed by the Supreme Court. B C

[13] In *Mamat Daud*, the petitioners, pursuant to leave obtained under art. 4 of the Federal Constitution, filed their suit for declaratory orders to the effect that s. 298A of the Penal Code is invalid on the ground that it makes provision with respect to a matter which Parliament has no power to make law. The petitioners contended that having regard to the pith and substance of the section, it is a law which ought to be passed not by Parliament but by State Legislative Assemblies, it being a legislation on Islamic religion according to art. 11 cl. 4(4) and Item 1 of List II, Ninth Schedule. For the respondent, it was contended that the section is valid as it is a law passed by Parliament on the basis of public order, internal security and also criminal law according to art. 11, cl. (5) and Item (3) and (4) of List 1, Ninth Schedule. The Supreme Court allowed the petitioners' application by majority. D E

[14] Mohd Azmi SCJ, in the majority judgment said: F

> In determining whether s. 298A in pith and substance falls within the class of subject matter of "religion" or "public order", it is the substance and not the form or outward appearance of the impugned legislation which must be considered. The impugned statute may even declare itself as dealing with religion, but if on investigation of the legislation as a whole, it is in fact not so, the Court must so declare. Conversely, it is not sufficient for the impugned legislation to declare itself as dealing with public order, if in substance, it seeks to deal directly or indirectly with religion or religious law, doctrine or precept, for no amount of cosmetics used in the legislative make-up can save it from being struck down for pretending to be what it is not. The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs. ... G H
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> On the scope and meaning of the doctrine of colourable legislation B.K. Mukherjee J had this to say in *K.C.G. Narayan Deo v. State of Orissa* AIR [1953] SC 375: I

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> … The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law …
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> If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within the respective spheres marked out by specific legislative entries, … questions do
B arise as to whether the legislature in a particular case has or has not … transgressed the limits of its constitutional powers. Such transgressions may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. …

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Applying the above principles, we shall now proceed to examine the provisions of s. 298A with strictness (as was done by the Privy Council in *Attorney General for Ontario v. Reciprocal Insurers* [1924] AC 328), the real substance of the legislation for the purpose of determining whether it is a colourable legislation, as alleged by the petitioners.

D **[15]** Having alluded to the specific sub-sections of s. 298A, the learned SCJ then said:

> In our view, all these specified acts and conducts have nothing to do with "public order" as envisaged by the Federal List; but they are directly concerned with religious matters or religious affairs. …

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> From our investigation, the claim that religion is merely incidental to the legislation cannot hold water. We therefore find neither Item 3(a) nor Item 4(b) of the Federal List forms the substance of the subject matter of the impugned section. Nor can the impugned section take refuge under Article 11 Clause (5) of the Constitution, as it simply cannot pass the
F subjective test of being a legislation relating to public order, public health or morality. Having considered and examined the provisions of s. 298A as a whole, we rule that it is a colourable legislation in that it pretends to be a legislation on "public order", when in pith and substance it is a law on the subject of religion with respect to which only the States have power to legislate under Article 74 and 77 of the Constitution. …

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> For reasons discussed, we allow the first two orders sought in the suit, viz. (1) a declaration that s. 298A of the Penal Code is a law with respect to a matter with respect to which Parliament has no power to make law, and (2) a declaration that s. 298A of the Penal Code is invalid and therefore null and void and of no effect …

H **[16]** Salleh Abas LP who also wrote the majority judgment said:

> Viewed in its proper perspective, the impugned section … is a law, the object of which is to ensure that Islamic religion practised in this country must conform to the tenets, precepts and practices allowed by States. … In enacting this impugned section I do not think that Parliament can really
I rely on its powers to legislate on public order because the exercise of such power comes in a direct conflict with State powers to legislate on, and control, the practices of Islamic religion.

[17] To sustain the charge under s. 298A(1)(a) and to support his submission that the application of s. 298A is not exclusive to the Muslims as the object of the said section was to ensure public order, learned Deputy made reference to the Hansard. Indirectly, learned Deputy was inviting us to revisit the issue on the true character and substance of s. 298A.

[18] The learned Deputy submitted thus:

> Mengguna pakai *ratio* di dalam penghakiman Mohd Azmi SCJ ini adalah jelas Mahkamah sekarang ini perlu membuat penyiasatan di dalam bentuk penilaian bukan sahaja secara am terhadap Seksyen 298A Kanun Keseksaan tetapi khususnya apakah subject matter pertuduhan yang dikenakan kepada Perayu-perayu dan apakah objektif, tujuan dan mengapa pertuduhan dirangka ke atas Perayu-perayu.
>
> Jika kandungan pertuduhan ke atas Perayu-perayu dibaca dengan teliti ia adalah bukan secara langsung berkenaan pentadbiran ajaran agama Islam tetapi penghinaan terhadap ajaran serta fahaman agama Islam oleh orang bukan Islam. Memandangkan kedua-dua perayu adalah bukan penganut agama Islam sudah tentu mereka tidak akan dapat diambil tindakan di bawah mana-mana Enakmen Syariah. Perayu-perayu tidak boleh dilepaskan summarily pada peringkat ini tanpa kami dapat memanggil sebarang saksi kerana Seksyen 298A Kanun Keseksaan secara amnya dan pertuduhan tersebut secara khususnya in substance adalah berkenaan public order dan public tranquillity.

[19] With respect, given that the Supreme Court had decided on s. 298A, it was not open for us to investigate the true character or substance of s. 298A. We thus found no necessity to consider whether the pith and substance of s. 298A is a subject matter of religion or public order.

[20] What we had to consider was the application of the doctrine of *stare decisis*. The submission of learned counsel for the appellants was that the learned trial judge was bound by the majority decision in *Mamat Daud*. Learned Deputy, on the other hand, submitted that the decision of *Mamat Daud* was not applicable; that the doctrine of *stare decisis* should not be followed blindly and that the decision in *Mamat Daud* should not be given a blanket application.

[21] The importance of the doctrine of *stare decisis* had been enunciated in a number of cases. We will only refer to one of them. In *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577, Steve Shim CJ (Sabah & Sarawak) said:

> [3] Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system. This fact was certainly borne in mind by the Court of Appeal in *Periasamy s/o Sinnapan & Anor v. Public Prosecutor* [1996] 2 MLJ 557 wherein Gopal Sri Ram JCA said:

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> We may add that it does not augur well for judicial discipline when a High Court Judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court Judges that they are bound by all judgments of this Court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.

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[22] The learned judge had given his interpretation on s. 298A contrary to that of the majority decision of the Supreme Court in *Mamat Daud* when His Lordship said:

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> [19] Mahkamah ini juga bersetuju dengan hujahan balas Tuan TPR yang bijaksana yang menyangkal hujahan peguambela pemohon-pemohon bahawa seksyen 298A Kanun Keseksaan hanya berkaitan dengan agama Islam semata-mata. Mahkamah ini bersetuju dengan hujahan Tuan TPR bahawa tujuan seksyen 298A Kanun Keseksaan digubal oleh Parlimen adalah untuk tujuan bagi menjaga ketenteraman awam di kalangan rakyat Malaysia yang berbilang kaum, bangsa dan juga berbilang agama. Turut dihujahkan bahawa seksyen 298A Kanun Keseksaan tersebut tidak menyatakan bahawa peruntukan itu secara khususnya terpakai kepada orang-orang yang beragama Islam semata-mata. Mahkamah ini memilih untuk mengikuti pandangan dan keputusan yang telah diberikan oleh Mahkamah Agung dalam kes *Mohamed Nor* [*supra*] dan juga pandangan 'dissenting' dalam kes *Mamat Daud* [*supra*].
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> ...
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> [21] ... membaca peruntukan di bawah seksyen 298A(1)(a) Kanun Keseksaan di atas, amat jelas sejelas gelas kristal bahawa peruntukan tersebut langsung tidak menyebut secara khusus bahawa peruntukan tersebut ditujukan khas kepada penganut (sic) beragama Islam. Perkataan-perkataan yang digunakan "... professing the same or different religions, ..." menunjukkan bahawa peruntukan tersebut terpakai bukan sahaja kepada penganut agama Islam malahan terpakai kepada penganut agama-agama atau kepercayaan yang lain juga.

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[23] In departing from the majority decision of the Supreme Court in *Mamat Daud*, His Lordship had sought to distinguish the present case in the following words:

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> 22. Mahkamah ini berpandangan bahawa fakta, keadaan dan situasi dalam kes *Mamat Daud* [*supra*] adalah berbeza dengan fakta, keadaan dan situasi yang timbul dalam kes terhadap pemohon-pemohon. Pertuduhan dalam kes *Mamat Daud* [*supra*] melibatkan isu berkaitan dengan pegawai masjid yang tidak mempunyai tauliah dan melibatkan orang beragama Islam di Terengganu. Pertelingkahan berlaku apabila sembahyang Jumaat diadakan di dua mesjid berbeza dalam satu kariah disebabkan oleh perbezaan fahaman politik. Sedangkan dalam kes terhadap pemohon-

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pemohon, selain berlaku di Kuala Lumpur, ianya melibatkan orang bukan Islam yang didakwa telah menghina orang-orang yang beragama Islam di dalam bulan Ramadan yang mulia dan lagi berkat bagi orang-orang Islam.

[23] Dalam kes *Mamat Daud* [*supra*] juga melibatkan perpecahan di kalangan orang-orang Islam di Terengganu dan tidak melibatkan kaum atau penganut agama atau kepercayaan yang lain. Sedangkan kes terhadap pemohon-pemohon melibatkan isu yang lebih meluas dan lebih sensitif yang jika tidak dibendung boleh menimbulkan pertelingkahan antara kaum, agama dan bangsa yang terdapat di Malaysia. Tujuan utama seksyen 298A(1)(a) Kanun Keseksaan adalah untuk mencegah dari berlakunya perkara-perkara tersebut sehingga boleh menggugat ketenteraman awam serta keselamatan negara secara keseluruhannya. Peruntukan tersebut turut memperuntukkan hukuman terhadap pelaku-pelaku yang melakukan kesalahan yang dipandang amat serius tersebut di mana sabit kesalahan boleh membawa hukuman penjara maksima 5 tahun.

[24] Mahkamah ini berpandangan bahawa keputusan majoriti Mahkamah Persekutuan (sic) dalam kes *Mamat Daud* [*supra*] tidak mengikat Mahkamah ini atas alasan yang dinyatakan di atas. Dalam keadaan sedemikian, Mahkamah ini lebih memihak kepada dapatan dan keputusan yang dibuat oleh Mahkamah Agung dalam kes *Mohamed Nor* [*supra*] dan pandangan yang diberikan oleh minoriti dalam kes *Mamat Daud* [*supra*].

[24] The decision of the Supreme Court in *Mamat Daud* was on a principle of law. The facts would not have mattered. In considering the issue whether Parliament or the State Legislative Assemblies should legislate the impugned section, the Supreme Court had, by majority ruled that s. 298A is, in pith and substance, a law on religion while the dissenting judgment ruled that it is on public order and criminal law. It is the majority judgment of the Supreme Court that creates the binding precedent. The dissenting judgment cannot be accepted as the correct state of law over the majority judgment (see *Barat Estates Sdn Bhd v. Parawakan Subramaniam & Ors* [2000] 3 CLJ 625; [2000] 4 MLJ 107; *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal* [2006] 1 CLJ 996; [2006] 1 MLJ 435).

[25] The true character and substance of s. 298A had thus been determined by the Supreme Court, which ruling had nullified the submission of learned Deputy and the finding by the learned judge that s. 298A is, in pith and substance, a law on public order. We (as the learned judge) were in no position to examine the section to make a new ruling or to decide otherwise.

[26] The learned judge had also stated that "... Mahkamah ini lebih memihak kepada dapatan dan keputusan yang dibuat oleh Mahkamah Agung dalam kes *Mohamed Nor* ...". In this regard, learned Deputy submitted that the *ratio decidendi* of the two decisions of the Supreme Court was in conflict and hence the High Court may choose which *ratio decidendi* it will follow.

[27] It must be noted that in *Mohamed Nor*, there was no challenge on s. 298A. Unlike in *Mamat Daud* where the Supreme Court was called upon to determine the true character and substance of s. 298A, in *Mohamed Nor*, the only issue before the Supreme Court was whether the sentence passed by the High Court was appropriate.

[28] In dismissing the appeal by the prosecution against sentence, Abdul Hamid CJ (Malaya) in *Mohamed Nor* said:

> In the instant case the learned Judge recognised that this section is designed to preserve law and order to maintain a state of harmony, unity and goodwill between persons or groups of persons professing the same or different religions that are being practiced in this country by preventing such persons from causing or attempting to cause disharmony or disunity or feelings of enmity, hatred or ill-will, and that the offences of the nature committed by the four respondents will have the effect of jeopardising Islamic unity, in the result, prejudicing the maintenance of unity and harmony in the country. The learned Judge proceeded to bind them over, to keep peace and good behaviour under section 294 of the Criminal Procedure Code.
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> The question now remains whether we should disturb the sentence in the instant case.

[29] Since the issue before the Supreme Court was purely on the adequacy of sentence, there was no proposition as such by the Supreme Court in *Mohamed Nor*, on the true character and substance of s. 298A. What was set out in the judgment quoted above, that s. 298A was designed to preserve law and order, was not the pronouncement of the Supreme Court as perceived by the learned judge but was the finding of the High Court. In the circumstances, it cannot be said that the *ratio decidendi* of the two decisions of the Supreme Court was in conflict with one another.

[30] Having regard to all the above, we found that the learned judge had erred in refusing to follow the majority decision of the Supreme Court on the true character and substance of s. 298A. We set aside the order of the High Court and we granted the orders prayed for by the appellants.